

5th Circ. Says Hoopa Valley Injury Suit Was Not Federal Matter

By **Diamond Naga Siu**

Law360 (December 15, 2020, 1:32 PM EST) -- A Fifth Circuit panel said Monday a Texas federal court was the wrong place for a firefighter's injury suit against the Hoopa Valley Tribe, dismissing the case even as it disagreed with a district court's sovereign immunity ruling.

U.S. Circuit Judge Carolyn Dineen King wrote for the panel that firefighter Matthew Mitchell raised only state law tort claims against the tribe and member Orico Bailey, not any questions of federal law.

And while Bailey, who felled a Hackberry tree with a chainsaw that landed on Mitchell during 2015 disaster recovery efforts, is a California resident, the panel said Mitchell couldn't establish federal jurisdiction through diversity of the parties because he also sued the tribe.

By adding Hoopa Valley as a party, Mitchell "destroyed complete diversity" because the federally recognized tribe is not a citizen of any state, the panel said.

"Although neither the Supreme Court nor the Fifth Circuit has squarely addressed this question, it appears all courts to have considered it agree: Indian tribes are not citizens of any state for the purpose of diversity jurisdiction," she added.

Because there is no federal jurisdiction in the case, the district court never had to reach the question of the tribe's sovereign immunity, Judge King wrote. The court partially reversed the district judge's dismissal of the case, saying part of Mitchell's claims should be dismissed without prejudice to refiling.

But Hoopa Valley counsel Thomas Schlosser of Morisset Schlosse Jozwiak & Somerville told Law360 Monday it is likely too late for Mitchell to open the case elsewhere since the statute of limitations for tort suits in Texas is two years and the incident happened in 2015.

Schlosser added that he was originally a bit concerned about the Fifth Circuit hearing this case since it rarely hears suits that include federally recognized tribes, but was happy with the decision.

"The district court was intrigued by the sovereign immunity issue and decided to write about that — and he was correct about that — and you just don't get to that unless the court has subject-matter jurisdiction," Schlosser told Law360 in a phone interview.

Schlosser said he hopes Mitchell received the care he needs, but that it seemed as though the "law just wasn't on his side" throughout the suit, and the courts agreed.

Senior U.S. District Judge David Ezra, who dismissed the case, wrote in his 2018 decision that under sovereign immunity, federally recognized tribes are immune from suits unless Congress authorized them or the tribe expressly waived its sovereign immunity.

"Tribal sovereign immunity shields: (1) the Indian tribe; (2) entities of the tribe that function as an 'arm of the tribe'; and (3) 'all tribal employees acting within their representative capacity and within the scope of their official authority,'" Judge Ezra wrote in his ruling.

Mitchell, who initiated the suit in 2017, claimed the tribe waived sovereign immunity when it got insurance to cover its flood recovery work in Wimberley, Texas, but the court was unconvinced and ruled the tribe had to "expressly" waive it.

Mitchell claimed in his complaint that he and Bailey agreed to clear off debris before cutting down an uprooted — but still standing — tree during flood relief efforts. While Mitchell cleared off debris, contrary to what they agreed to do, Bailey used his chainsaw to cut down a tree that was vital to keeping the uprooted tree standing, causing it to fall.

According to Mitchell's complaint, the firefighter suffered a "crush injury" to his pelvis and "severe bodily injuries" when the tree pinned him to the floor, and he had sought compensation for the damages.

U.S. Chief Circuit Judge Priscilla R. Owen and Circuit Judges Carolyn D. King and Kurt Damian Engelhardt sat on the panel for the Fifth Circuit.

Counsel for Mitchell did not immediately respond to requests for comment Monday.

Mitchell is represented by Stephen F. Lazor of Tinsman & Sciano Inc. and Chad Flores of Beck Redden LLP.

Bailey and associated parties are represented by Wesson Tribble of Tribble Ross and Thane D. Somerville and Thomas Paul Schlosser of Morisset Schlosser Jozwiak & Somerville.

The case is Matthew Mitchell v. Orivo Bailey et al., case number 19-51123, in the U.S. District Court of Appeals for the Fifth Circuit.

--Editing by Philip Shea.